No. 03-954

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THOMAS TIERNEY AND DORIS G. MARAH, INDIVIDUALLY AND ON BEHALF OF A CLASS OF OTHERS SIMILARLY SITUATED,

Petitioners,

—v.—

JOHN HANCOCK FINANCIAL SERVICES, INC., JOHN HANCOCK LIFE INSURANCE COMPANY, AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JOHN HANCOCK RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

John G. Fabiano
Peter Spaeth
HALE AND DORR LLP
60 State Street
Boston, Massachussetts 02109
(617) 526-6000

Edwin G. Schallert
(*Counsel of Record*)
Diane Hester
Kristin D. Kiehn
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for John Hancock Respondents

QUESTIONS PRESENTED

1. Should this Court review an order affirming dismissal of certain counts of a complaint where (1) Petitioners' questions presented were neither raised before the state courts below, nor passed upon by those courts, (2) Petitioners' Contracts Clause argument is based on a court's opinion rather than legislative action, and Petitioners have failed to show any contractual agreement relating to John Hancock's conversion upon which to premise their breach of contract claims, and (3) the lower court's holding that Petitioners had failed to establish any independent claims against John Hancock did not deprive Petitioners of due process?

CORPORATE DISCLOSURE STATEMENT

In January 2000, John Hancock Mutual Life Insurance Company reorganized from a mutual life insurance company to a stock life insurance company, pursuant to section 19E of Chapter 175 of the Massachusetts General Laws, and the company is now John Hancock Life Insurance Company. John Hancock Life Insurance Company is wholly owned by John Hancock Financial Services, Inc., which is publicly owned. To Respondents' knowledge, there are no persons or corporations who own 10% or more of the shares of John Hancock Financial Services, Inc.

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STATEMENT OF THE CASE

In January 2000, John Hancock Mutual Life Insurance Company ("John Hancock") reorganized from a mutual life insurance company to a stock life insurance company pursuant to section 19E of Chapter 175 of the Massachusetts General Laws (the "Conversion Law"). This process is known as demutualization. John Hancock's Plan of Reorganization (the "Plan") provided that policyholders would exchange their illiquid, nontransferable interests in the mutual company for valuable shares of common stock, cash or policy credits. App. 53. This consideration represented 100% of the value of the company. At the same time, the "demutualization [did] not reduce existing policy or annuity contract benefits, guarantees, values or dividend rights, all of which . . . remain[ed] in full force and effect." App. 53. The principal purpose of the reorganization was to strengthen John Hancock by providing greater organizational flexibility and improved access to capital markets. App. 52.

As required by the Conversion Law, John Hancock submitted the Plan to its policyholders and to the Massachusetts Commissioner of Insurance ("the Commissioner") for their approval. Nearly 94% of the more than one million voting policyholders approved the Plan — far surpassing the statutory requirement of a two-thirds vote. App. 64-65. The Commissioner conducted an adjudicatory hearing at which numerous policyholders — including Petitioner Thomas Tierney and counsel on behalf of Petitioner Doris G. Marah — presented oral and written statements. App. 57-60, 160-61. In December 1999, the Commissioner approved the Plan in a written decision containing her detailed findings based on an extensive record, including her determination that the "Plan provides each eligible

policyholder with 'appropriate consideration' . . . based upon a fair and reasonable formula." App. 71. In reaching her conclusion, the Commissioner expressly rejected Petitioners' objections to the use of (1) an IPO to value aggregate consideration; (2) the historic plus allocation formula; and (3) implementation of a "closed block," an arrangement of certain policies created to protect reasonable dividend expectations.

Petitioners then filed a putative class action in the Superior Court of Massachusetts. *See Tierney v. John Hancock Mut. Life Ins. Co.*, No. 00-0087, 2000 WL 33223223 (Mass. Super. Dec. 18, 2000).[1] They sought to set aside the Commissioner's approval of John Hancock's conversion, again arguing that the Plan impermissibly utilized (1) a method for valuing aggregate consideration by means of an IPO that allegedly did not provide "appropriate consideration" for all of plaintiffs' membership interests; (2) an historic plus method for allocating consideration; and (3) a closed block. App. 136-81. Petitioners argued that the inclusion of the closed block in the Plan "constitute[d] a material revision and deprivation of [their] rights under [John Hancock's] charter and their contractual rights." App. 150. They claimed that the Commissioner violated the Conversion Law, acted in excess of her statutory authority, and permitted an unconstitutional taking when she approved the Plan. App. 164-65.

Petitioners also brought nine purported "independent" causes of action against John Hancock. Six of those causes of

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[1] The action was brought, in part, pursuant to Mass. Gen. Laws. ch. 30A, § 14(7), which provides for judicial review of administrative agency decisions.

action were for breach of contract, wherein Petitioners repeated their objections to the Plan, alleging that their insurance contracts had been breached and John Hancock's charter violated by the Plan's implementation of (1) an IPO; (2) the historic plus allocation formula; and (3) a closed block. App. 166-72.

On December 18, 2000, the Massachusetts Superior Court upheld the Commissioner's decision under established principles applicable to the judicial review of agency decisions. Rejecting Petitioners' challenges, including their takings argument, App. 39, the court concluded that the Commissioner's decision was "supported by substantial evidence, was warranted by the facts presented to and found by her, and was neither based on an error of law nor was it arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." App. 46. The court also dismissed the remaining counts of the complaint, concluding that Petitioners had failed to establish independent claims against John Hancock. The court held that those claims presented "nothing more than" indirect restatements of challenges to the Commissioner's decision and that "all of the arguments underlying the claims against the Hancock defendants" had already been properly rejected by the Commissioner. App. 48-49. The court observed that "[i]n connection with this Commissioner-approved conversion, it cannot then be said that the Hancock defendants breached contractual obligations." App. 50-51.

Petitioners then moved in the Massachusetts Supreme Judicial Court for direct review of the Superior Court's decision. The court denied their application. App. 29. Petitioners next appealed the Superior Court's ruling to the Massachusetts Appeals Court, which affirmed the lower

court's decision. The Appeals Court made short shrift of Petitioners' constitutional claims, rejecting Petitioners' takings claim for failure to establish state action, App. 17-18 n.14, and expressly observing that Petitioners had *not* brought a Contracts Clause claim because they were not challenging the constitutionality of the Conversion Law.[2] App. 23. With respect to Petitioners' independent claims against John Hancock, the court specifically found that the "allegations that particular features of the [Plan] violated their individual policies are merely reiterations of the objections raised in the administrative proceeding. . . . Thus, adjudication of . . . the contract claims is 'dependent on the substance of the commissioner's determinations during the administrative proceedings.' The claims were properly dismissed." App. 24 (internal citation omitted). Petitioners' second application to the Massachusetts Supreme Judicial Court for further appellate review was denied without comment. App. 28.

REASONS FOR DENYING THE WRIT

Petitioners attempt to characterize the Appeals Court's dismissal of their breach of contract claims as violations of the Contracts and Due Process Clauses of the United States Constitution. Not only are Petitioners' theories both legally and factually flawed, their arguments were not preserved below for review by this Court.

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[2] The Appeals Court further observed that there could be no viable Contracts Clause challenge to the Conversion Law itself because "by enacting the conversion statute, the Legislature effectively superseded the provisions of the charter and individual policies. Indeed, the JHM charter was itself created by legislation . . . ." App. 23; *accord Tancredi v. Metropolitan Life Ins. Co.*, 149 F. Supp. 2d 80, 88 (S.D.N.Y. 2001) (dismissing Contracts Clause claim based on argument that insurer's demutualization impaired the company's charter), *aff'd*, 316 F.3d 308 (2d Cir.), *cert. denied*, __ U.S. __, 123 S. Ct. 2610___ (2003).

I.
The Questions Presented Were Not Raised Or Passed Upon Below And Are Not Properly Before This Court.

The Petition should be denied because Petitioners' federal constitutional claims were neither pressed nor passed upon below.[3] *See* Sup. Ct. R. 14(g)(i) (petition for review of state court judgment must demonstrate that federal questions were "timely and properly raised" below).[4]

Petitioners seek to argue before this Court that the Appeals Court violated the Contracts and Due Process Clauses by affirming dismissal of their breach of contract claims, which that court concluded were claims premised on Petitioners' same objections to the Plan that the Commissioner and the Superior Court had found to be without merit. However, the only federal constitutional argument presented to the Appeals Court centered on Petitioners' contention that the Commissioner's approval of the Plan permitted an unconstitutional "impairment" and

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[3] Respondents refer *infra* to Petitioners' briefs submitted in the proceedings below as follows: Brief of Appellants in the Appeals Court ("App. Ct. Br."); Application of Plaintiffs-Appellants for Direct Appellate Review in the Supreme Judicial Court ("Sup. J. Ct. Br. I"); Application of Appellants for Further Appellate Review in the Supreme Judicial Court ("Sup. J. Ct. Br. II").

[4] *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (refusing to consider new substantive arguments attacking the judgment of the court below); *Clark v. Jeter*, 486 U.S. 456, 459-60 (1988) (refusing to consider federal preemption argument not raised or passed on below and observing that interpretation of state statute is ultimately a question of state law); *see also McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) ("[I]t is . . . the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions . . . not pressed or passed upon in the courts below.").

"taking" of policyholders' membership interests without just compensation. App. 187-90; *see also* App. 2. With respect to the Superior Court's dismissal of their independent claims, Petitioners argued that the court (i) erroneously converted their motion to dismiss to one for summary judgment, and (ii) erroneously relied upon the administrative record in dismissing their claims. App. 191-94.

In their application for further review of the Appeals Court's decision to the Supreme Judicial Court, Petitioners argued that the lower courts committed an error of statutory construction in dismissing their contract claims because the Conversion Law does not expressly eliminate such claims. App. 198-99. The sole reference to any conceivable constitutional impairment is in a footnote, which posits that the Conversion Law does not violate the Contracts Clause because it "could [not] be read to totally eliminate Members' right to full contract damages." App. 198 n.14. The Supreme Judicial Court denied review without comment. App. 28.

Similarly, Petitioners never raised a federal Due Process claim challenging the lower courts' dismissal of their contract claims as a deprivation of their purported right "to adjudicate the value of their contractual damages." Pet. 17. In the Appeals Court, Petitioners complained that the Superior Court's determination deprived Petitioners of their right to a jury trial under the Massachusetts Constitution.[5] App. 194. No reference was made to the federal Due Process clause. On appeal to the Supreme Judicial Court, Petitioners once again

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[5] Petitioners argued that "Members hold a 'sacred' right to have their controversy with the Hancock Defendants concerning their contracts, statutory rights and property to be decided at trial by a jury and to obtain a remedy for the loss of their property. Mass. Const. Pt. 1, Art. 10, 11 and 15; *Lavelle v. Massachusetts Comm'n Against Discrimination*, 426 Mass. 332 (1997)." App. 194.

raised their right to a jury trial under state — not federal — law.[6] Sup. J. Ct. Br. II at 22.

None of the courts below was confronted with or addressed the questions presented to this Court. The Petition should be denied for this reason alone.

II.
Petitioners Have Failed To Present Any Issue Deserving Of This Court's Consideration.

A. Petitioners' Contracts Clause Argument Is Without Merit.

Petitioners' contention that "the *opinion* of the Massachusetts Appeals Court violates the Contracts [Clause]," Pet. 11 (emphasis added), fails on its face. As this Court has made clear in a line of precedent stretching back more than a century, the Contracts Clause is "aimed at the legislative power of the state, and not at the decisions of its courts." *New Orleans Water-Works Co. v. Louisiana Sugar-Refining Co.*, 125 U.S. 18, 30 (1888).[7] Even if the decision of the Appeals Court dismissing Petitioners' contract claims had incorrectly applied the Conversion Law and impaired

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[6] The only time Petitioners invoked the federal Constitution with respect to this claim was in their brief for direct appellate review of the Superior Court's decision to the Supreme Judicial Court — an application that was denied. Petitioners cited the Seventh Amendment in support of their purported right to a jury trial for their common law claims, not the Fifth or Fourteenth Amendments. Sup. J. Ct. Br. I. at 17.

[7] *See, e.g., Barrows v. Jackson*, 346 U.S. 249, 260 (Contracts Clause "is directed against legislative action only" and not "judgments of courts"), *reh'g denied*, 346 U.S. 841 (1953); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924) ("It has been settled by a long line of decisions, that the [Contracts Clause] is directed only against impairment by legislation and not by judgments of courts.").

obligations under their contracts — which it did not — there would be no basis for invoking review in this Court. *See Central Land Co. of W. Va. v. Laidley*, 159 U.S. 103, 110 (1895) ("The power delegated to [the Court] is for the restraint of unconstitutional legislation by the states and not the correction of alleged errors committed by their judiciary" even if those judgments, "'in their effect, impair the obligation of contracts'") (quoting *Knox v. Exchange Bank*, 12 Wall 379, 383 (1870)).

Petitioners' argument is further flawed for its failure to establish any contractual agreement relating to John Hancock's conversion that could form the basis for a breach.[8] *See General Motors Corp. v. Romein*, 503 U.S. 181, 186-87 (1992) (rejecting Contracts Clause claim in absence of contractual agreement regarding specific terms at issue). While Petitioners vaguely refer to their purported right to "adjudicate the full compensatory value of their contractual interests," *see, e.g.*, Pet. 11, they are tellingly silent as to the source of any such "contractual" interests. This omission is probably due to the fact that neither John Hancock's charter nor Petitioners' life insurance contracts contain any provisions regarding (1) the use of a particular valuation method in calculating aggregate demutualization consideration, (2) the use of a particular formula to allocate demutualization consideration — *i.e.*, the use of the historic only method instead of the historic plus method, or (3) the particular structuring of the closed block. *See Lovell v. One Bancorp*, 818 F. Supp. 412, 422 (D. Me. 1993) (rejecting

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[8] Needless to say, Petitioners also fail to show that the alleged impairment was "substantial" and that it was not justified by "a significant and legitimate public purpose" or was not "reasonable" in view of that purpose. *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983).

Contracts Clause claim relating to savings bank conversion where "[t]here is no evidence of any express contract between Plaintiffs and [bank] providing that Plaintiffs have an interest in the net worth of the bank" or "contractual right to the surplus of the bank"), *aff'd,* 14 F.3d 44 (1st Cir.), *cert. denied*, 512 U.S. 1235 (1994). The treatment of those issues is governed by the Conversion Law — not Petitioners' life insurance contracts or John Hancock's charter. *See id.* ("The Maine Banking Code rather than the bank's charter controls the subject of depositors' rights on conversion, and the Code provides no solace for Plaintiffs.").

In any event, the decision of the Appeals Court did not "impair" any of Petitioners' contractual rights. To the contrary, the court specifically noted that "the policyholders' membership interests do not include the policyholders' rights arising under their insurance policies or annuities because the demutualization does not reduce the policy benefits, values, premiums, guarantees or policy dividend rights." App. 6 n.4. The Appeals Court further determined that Petitioners' breach of contract causes of action "simply restated" their objections to approval of the Plan which had been properly rejected by the Commissioner. Thus, the Appeals Court properly rejected Petitioners' attempts to seek further judicial review of the Commissioner's approval of the IPO, the historic plus formula and the closed block by repackaging their challenges as common law claims. App. 50.

B. The Petition Does Not Raise A Due Process Violation.

While Petitioners' breach of contract claims were set forth in the complaint as independent causes of action, the court below correctly saw them for what they were —

"'indirect challenges to the [c]ommissioner's [d]ecision'" and "mere[] reiterations of the objections raised in the administrative proceedings." App. 23-24 (alteration in original). The Appeals Court correctly determined that the adjudication of the contract claims was "'dependent on the substance of the commissioner's determinations.'" App. 24 (internal citation omitted). In the wake of the court's affirmation of the Commissioner's decision, the underpinnings for Petitioners' contract claims evaporated. The fact that the lower courts rejected Petitioners' arguments as without merit did not deprive them of due process; otherwise, all litigants whose claims are dismissed before trial would have recourse in this Court. Nor do Petitioners have any constitutional right to rehash in an alternate forum objections to an administrative decision that have been found to be without merit.

Petitioners had ample opportunity to air their objections to the IPO, the historic plus formula and the closed block. They presented those arguments to the Commissioner, who specifically addressed them and found them to be without merit.[9] They raised them again in the Superior Court when they sought judicial review of the Commissioner's decision. They made those arguments yet again in their brief to the Appeals Court. And they brought those arguments twice to the Supreme Judicial Court. The fact that those courts agreed with the Commissioner's rejection of Petitioners' arguments

[9] Petitioners' contention that they were precluded from raising their breach of contract arguments in the administrative proceedings because the Commissioner did not have the power to award them damages against John Hancock is nonsensical. Petitioners argued below that their damages were caused by the implementation of the Plan. *See, e.g.*, App. 165, 166; App. Ct. Br. at 2-3. Petitioners do not and cannot deny that the Commissioner had the power to stop the Company from demutualizing.

and refused to allow Petitioners to restate and reargue those same claims as "independent" causes of action does not constitute a deprivation of due process.

Accordingly, the decision below presents no issues meriting this Court's review.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

JOHN G. FABIANO
PETER SPAETH
HALE AND DORR, LLP
60 State Street
Boston, Massachusetts 02109
Telephone: (617) 526-6000

EDWIN G. SCHALLERT
(*Counsel of Record*)
DIANE HESTER
KRISTIN D. KIEHN
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
Telephone: (212) 909-6000

Attorneys for John Hancock Respondents

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